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Ahmad Zahid bin Hamidi v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–529–11 OF 2019
YAACOB MD SAM, MOHAMAD ZABIDIN AND AHMAD NASFY JJCA
15 DECEMBER 2020

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Criminal Procedure — Charges — Application to amalgamate — Appeal against decision of High Court in dismissing application — Whether s 153(2) of Criminal Procedure Code ('the CPC') was mandatory — Whether charges satisfied requirement of s 153(1) of CPC — Whether non-compliance of s 153(2) of CPC would cause both unfairness and prejudice to appellant — Whether approach taken by prosecutor oppressive, unjustifiable and act of mala fide — Criminal Procedure Code s 153(2)

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The appellant was charged with 12 charges under s 409 of the Penal Code. The appellant filed an application to amalgamate the 12 charges under s 409 of the Penal Code into three charges pursuant to s 153(2) of the Criminal Procedure Code ('the CPC'). The learned High Court judge dismissed the appellant's application. Hence, this appeal. The appellant posited four grounds of appeal ie: (a) that the non-compliance of s 153(2) of the CPC would cause both unfairness and prejudice to the appellant, undermining the appellant's right to a fair trial; (b) that the complaint of fairness was quite distinct with the issue of clarity of charges, which was not the complaint of the appellant; (c) that notwithstanding whether s 153(2) of the CPC was mandatory or otherwise, the primary duty of a criminal court was to ensure that the prosecutor act with fairness; and (d) that the approach taken by the prosecutor was oppressive and unjustifiable.

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Held, dismissing the appeal:

(1) Section 153(2) of the CPC was an enabling provision. This provision allowed the court to lump various sums of money without specifying particular items or exact date into one charge provided such dates did not exceed one year. It did not impose a mandatory requirement for criminal breach of trust charges to be consolidated. The learned High Court judge was right in holding that s 153(2) of the CPC was not mandatory in nature. It was not mandatory for all 12 charges in this case to be amalgamated (see paras 10 & 13).

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(2) The amended charges 'make for greater clarity resulting in the defence being left with no doubt as to not only identity what were the source of

the funds but also serves to identify how and for what purpose these moneys were allegedly misused'. The amended charges provided clear and specific as to the manner or modes in which the alleged criminal breach of trust were committed. The charges as tendered clearly satisfied the requirement of s 153(1) of the CPC (see para 16).

(3) The appellant failed to demonstrate how and in what manner he was prejudiced. It was not sufficient for the appellant to merely allege that he was prejudiced without saying more. Hence, the mere fact that all the 12 charges were not amalgamated would not cause prejudice and unfairness to the appellant (see para 17).

(4) There was no specific proof of improper or bad motive on the part of the prosecution in preferring the 12 charges instead of three. It was trite law that the onus of proving mala fide was on the appellant who made the allegation and it was not an easy one to discharge. There was no evidence of mala fide on the part of the prosecution when the prosecution decided not to amalgamate the 12 charges into three charges (see paras 20–22).

[Bahasa Malaysia summary

Perayu didakwa dengan 12 pertuduhan di bawah s 409 Kanun Keseksaan. Perayu mengemukakan permohonan untuk menggabungkan 12 tuduhan di bawah s 409 Kanun Keseksaan menjadi tiga tuduhan berdasarkan s 153(2) Kanun Tatacara Jenayah ('KTJ'). Hakim Mahkamah Tinggi yang bijaksana menolak permohonan perayu. Oleh itu, rayuan ini. Perayu mengemukakan empat alasan rayuan iaitu: (a) bahawa ketidakpatuhan s 153(2) KTJ akan menyebabkan ketidakadilan dan juga prejudis terhadap perayu, menjejaskan hak perayu untuk perbicaraan yang adil; (b) bahawa aduan keadilan cukup berbeza dengan isu kejelasan pertuduhan, yang bukan merupakan aduan perayu; (c) bahawa walaupun s 153(2) KTJ adalah wajib atau sebaliknya, tugas utama mahkamah jenayah adalah memastikan bahawa pendakwaan bertindak dengan adil; dan (d) bahawa pendekatan yang diambil oleh pendakwaan adalah menindas dan tidak dapat dibenarkan.

Diputuskan, menolak rayuan:

(1) Seksyen 153(2) KTJ adalah peruntukan yang membenarkan. Peruntukan ini memungkinkan mahkamah untuk mengumpulkan sejumlah besar wang tanpa menyatakan item tertentu atau tarikh tepat menjadi satu pertuduhan dengan syarat tarikh tersebut tidak melebihi satu tahun. Ia tidak menetapkan syarat wajib untuk tuduhan pecah amanah disatukan. Hakim Mahkamah Tinggi yang bijaksana benar berpendapat bahawa s 153(2) KTJ tidak bersifat mandatori. Tidak diwajibkan semua 12 tuduhan dalam kes ini digabungkan (lihat perenggan 10 & 13).

(2) Pertuduhan yang dipinda itu 'membuat kejelasan yang lebih besar

mengakibatkan pembelaan dibiarkan tanpa keraguan untuk tidak hanya mengenal pasti sumber dana tetapi juga berfungsi untuk mengenal pasti bagaimana dan tujuan wang ini didakwa disalahgunakan'. Pertuduhan yang dipinda memberikan jelas dan spesifik mengenai cara atau mod di mana dakwaan pelanggaran amanah yang dilakukan. Pertuduhan seperti yang dinyatakan secara jelas memenuhi syarat s 153(1) KTJ (lihat perenggan 16).

(3) Perayu gagal menunjukkan bagaimana dan dengan cara apa dia diprejudiskan. Tidak memadai bagi perayu untuk hanya mendakwa bahawa dia diprejudiskan tanpa mengatakan lebih banyak. Oleh itu, kenyataan bahawa kesemua 12 pertuduhan tidak digabungkan tidak akan menimbulkan prejudis dan ketidakadilan kepada perayu (lihat perenggan 17).

(4) Tidak ada bukti khusus mengenai motif tidak wajar atau buruk pihak pendakwaan yang memilih 12 pertuduhan daripada tiga. Adalah undang-undang mantap bahawa tanggungjawab untuk membuktikan mala fide adalah pada perayu yang membuat tuduhan tersebut dan bukan mudah untuk ditolak. Tidak ada keterangan ketidakadilan pihak pendakwaan ketika pihak pendakwaan memutuskan untuk tidak menggabungkan 12 tuduhan tersebut menjadi tiga tuduhan (lihat perenggan 20–22).]

Cases referred to

Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v PP [2014] 1 MLJ 624; [2014] 1 CLJ 697, CA (refd)
Aishah bt Mohd Rose & Anor v PP [2016] 1 MLJ 840, CA (refd)
Datuk Haji Harun bin Haji Idris & Ors v PP [1978] 1 MLJ 240, FC (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350, CA (refd)
PP v Kok Wah Kuan [2008] 1 MLJ 1, FC (refd)
Rancchod Lai v State of Madhya Pradesh AIR 1288 SC 1248, SC (refd)
Royappa v State of Tamil Nadu & Anor AIR 1974 SC 555, SC (refd)
Yeap Seok Pen v Government of the State of Kelantan [1986] 1 MLJ 449, PC (refd)

Legislation referred to

Criminal Procedure Code s 153(1), (2)
Criminal Procedure [IND] s 212
Penal Code s 409

Appeal from: Criminal Application No WA-44–236–09 of 2019 (High Court, Kuala Lumpur)

Hisyam Teh Poh Teik (Ahmad Zaidi bin Zainal with him) (Shahrul Hamidi & Haziq) for the appellant.

Ahmad Sazilee bin Abdul Khairi (Mohd Afif bin Ali with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Mohamad Zabidin JCA:

[1] The appellant was charged in the Sessions Court in Kuala Lumpur with 12 charges under s 409 of the Penal Code. These charges were registered under Criminal Case No WA-62r-49–10 of 2019. The details of the charges are:

(a) ten charges were preferred against the appellant for offences under s 409 of the Penal Code on 19 October 2018; and

(b) further, on 14 December 2018 and 20 February 2019, two additional charges were preferred against the appellant for the same offences, respectively.

[2] Subsequently, all of the above charges were transferred to the High Court of Malaya in Kuala Lumpur and registered under Criminal Trial No WA-45–7–02 of 2019 ('Criminal Trial') . The criminal trial was then fixed for trial in Mahkamah Tinggi Jenayah 1, Kompleks Mahkamah Kuala Lumpur commencing 18 November 2019 until 22 November 2019, 2 December 2019 until 6 December 2019 and 9 December 2019 until 12 December 2019.

[3] On 24 September 2019, The appellant filed an application to amalgamate the 12 charges under s 409 of the Penal Code into three charges ('the application') pursuant to s 153(2) of the Criminal Procedure Code.

[4] On the 5 December 2019, the learned High Court judge dismissed the appellant's application. Hence, this appeal before us. We heard the appeal on 23 June 2020. We unanimously found no merit in the appellant's appeal and we dismissed it.

GROUNDS OF APPEAL

[5] The appellant's grievances in this appeal basically is against the decision of the learned High Court judge in not exercising his discretion in favour of the appellant when his lordship failed to direct the respondent to consolidate all the twelve charges under s 409 of the Penal Code into three pursuant to s 153(2) of the Criminal Procedure Code ('the CPC'). The appellant posited four grounds of appeal and they were as follows:

(a) that the non-compliance of s 153(2) of the Criminal Procedure Code would cause both unfairness and prejudice to the appellant, undermining the appellant's right to a fair trial;

(b) that the complaint of fairness is quite distinct with the issue of clarity of charges, which is not the complaint of the appellant;

(c) that notwithstanding whether is mandatory or otherwise, the primary duty of a criminal court is to ensure that the prosecutor act with fairness; and

(d) that the approach taken by the prosecutor was oppressive and unjustifiable.

[6] The learned counsel for the appellant submitted, inter alia, there were non-compliance of s 153(2) of the CPC which is mandatory in nature. It was the appellant's case that specific manner of construction of charges in relation to criminal breach of trust offences has been clearly stipulated under s 153 of the CPC. Therefore such manner should be adhered to and any failure to do so would cause both unfairness and prejudice to the appellant and undermining the appellant's right to a fair trial.

[7] It was further submitted by the learned counsel 'fairness' is the key characteristic of the criminal justice system, and it includes procedural fairness. A criminal court has a primary duty to ensure that the prosecutor act with fairness. In this case, the 12 charges should have been constructed into only three charges, as allowed by s 153(2) of the CPC. Failure to do so amounting to oppression. Learned counsel referred us to Court of Appeal case *Aishah bt Mohd Rose & Anor v Public Prosecutor* [2016] 1 MLJ 840 at p 855; *Public Prosecutor v Kok Wah Kuan* [2008] 1 MLJ 1; *Md Desa bin Hashim v Public Prosecutor* [1995] 3 MLJ 350 as the authority to support his contention.

OUR DELIBERATION AND DECISION

[8] Going through the course papers and submission by counsel for the appellant, it is clear to us that the appellant's application in the High Court was made under s 153(2) of the CPC. The gist of the appellant's case was that the non-amalgamation of the 12 charges into three charges was against s 153(2) and it was oppressive and caused prejudice and unfairness to the appellant.

[9] For easy reference, we reproduce s 153(2) of the CPC below and it reads:

> 153 Particulars as to time, place and person
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> (1) The charge shall contain such particulars as to the time and place of the alleged offence and the person, if any, against whom or the thing, if any, in respect of which it was committed as are reasonably sufficient to give the accused notice of the matter with which he is charged.
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> (2) When the accused is charged with 'criminal breach of trust or dishonest misappropriation of money it shall be sufficient to specify the gross sum in respect

A of which the offence is alleged to have been committed and the dates between which the offence is alleged to have been committed, without specifying particular items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 164: Provided that the time included between the first and last of such dates shall not exceed one year.

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[10] Reading s 153(2) we, with respect, are in agreement with the learned High Court judge who opined that this is an enabling provision. It is our considered view that this provision allows the court to lump various sums of money without specifying particular items or exact date into one charge C provided such dates does not exceed one year. It does not impose a mandatory requirement for criminal breach of trust charges to be consolidated.

[11] As correctly observed by the learned High Court judge, whose view with respect, we concur: D

> [24] It is apparent from the general wording itself of sub-section (2) and I agree with the prosecution, that it provides the prosecution with an option of including together various sums of money without specifying particular items or exact dates into one charge. It is therefore an enabling and not a mandatory provision.
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> E [25] The above proposition is reinforced by the learned author of *Sarkar, Code of Criminal Procedure* (10th Ed 2012), cited by the prosecution, which described s 212(2) of the Indian Code of Criminal Procedure Code, which is in pari materia with our s 153(2) of the CPC, as an exception to subsection 1 at 1136, as follows:
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> > F Sub-s (2) is an exception to meet a certain contingency as it is not the normal rule as to framing of a charge in cases of criminal breach of trust. It is only when it may not be possible to specify exactly particular items or the exact date on which individual items were misappropriated that the Court is authorized to lump up the various items. When so done, the charge is deemed to be the charge of one offence. If several items in regard to which criminal breach of trust has been G committed are not lumped together, no illegality in trial of those offence.
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> [26] At p 1138 of the same textbook, it was stated as follows:
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> > Nowhere is it prescribed that separate charges for separate amounts misappropriated shall not be resorted to and that all should be added together H into a gross sum and tried in one charge.

[12] Further, as was held by the Indian Supreme Court in the case of *Rancchod Lai v State of Madhya Pradesh* AIR 1288 SC 1248, referred to us by the respondent, at p 1250 of the judgment, sub-s (2) to s 212 of Indian Code I of Criminal Procedure, which is in pari materia with our s 153 of the CPC is an exception to meet a certain contingency and is not the normal rule with respect to framing of a charge in cases of criminal breach of trust. It was further held that:

> The normal rule is that there should be a charge for each distinct offence, as provided in Section 233 of the Code. Section 222 mentions what the contents of the charge should be. It is only when it may not be possible to specify exactly particular items with respect to which criminal breach of trust took place or the exact date on which the individual items were misappropriated or in some similar contingency, that the Court is authorized to lump up the various items with respect to which criminal breach of trust was committed and to mention the total amount misappropriated within a year in the charge. If several distinct item with respect to which criminal breach of trust has been committed are not lumped together as in the present case, no illegality is committed in the trial of those offences. In fact, a separate trial with respect to each distinct offence of criminal breach of trust with respect to an individual item is the correct mode of proceeding with the trial.

[13] For the above said reasons we find, with respect, the learned High Court judge was right in holding that s 153(2) of the CPC is NOT mandatory in nature. It is not mandatory for all 12 charges in this case to be amalgamated.

[14] Flowing from the above finding, the next issue is, notwithstanding s 153(2) of the Criminal Procedure Code is not mandatory, whether the non-amalgamation of the charges caused prejudice and unfairness to the appellant, thereby affecting the appellant's right of fair trial.

[15] In order to answer this allegation by the appellant, we need to look at the essential ingredients of the charge for criminal breach of trust under s 409 of the Penal Code. The essential ingredients are:

(a) the accused was either a public servant or an agent;

(b) the accused was entrusted with the property in question or with dominion over it; and

(c) the accused had committed a criminal breach of trust in respect of it.

[16] Going through all the amended charges tendered by the prosecution, we are constrained to agree with the learned High Court judge that the amended charges 'make for greater clarity resulting in the defence being left with no doubt as to not only identity what were the source of the funds but also serves to identify how and for what purpose these moneys were allegedly misused'. The amended charges provide clear and specific as to the manner or modes in which the alleged criminal breach of trust were committed. This was done despite there is no requirement under the law for the prosecution to spell out in the charge the manner of the breach see *Ahmad Zubair @ Ahmad Zubir bin Hj Murshid v Public Prosecutor* [2014] 1 MLJ 624 at pp 629–630; [2014] 1 CLJ 697 at pp 704–705 (FC); *Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor* [1978] 1 MLJ 240 at p 252 (FC). The extra miles taken by the prosecution in specifying the manner or modes in which the alleged

criminal breach of trust were committed rules out the necessity of the appellant from guessing, before the commencement of trial, what were the particulars of the manner or mode of the alleged misappropriation alleged to have been committed by him. This would enable him to better instruct his counsel as to what possible defence he may have. The charges as tendered clearly satisfy the requirement of s 153(1) of the CPC.

[17] On the allegation that the many charges preferred against the appellant instead of three (if the charges are amalgamated), would prejudice the appellant and prevented him from getting fair trial, we find the appellant failed to demonstrate how and in what manner he was prejudiced. It is not sufficient for the appellant to merely allege that he was prejudiced without saying more. Hence, the mere fact that all the 12 charges were not amalgamated would not, in our considered view, cause prejudice and unfairness to the appellant, as contended by the appellant.

[18] The final issue is whether the approach taken by the prosecutor in preferring 12 charges instead of amalgamating them into three charges was oppressive, unjustifiable and an act of mala fide.

[19] Relying on the provision under s 153(2) if the CPC, the appellant alleged in his affidavit in reply, inter alia, as follows:

> 6.6 Selanjutnya, saya juga menyatakan bahawa pihak Responden telah secara salah dan dengan niat jahat tidak menggabungkan 12 pertuduhan-pertuduhan tersebut sedangkan undang-undang di bawah Seksyen 153(2) KTJ telah membolehkan pertuduhan-pertuduhan tersebut digabungkan dan jumlah pertuduhan terhadap saya boleh dikurangkan berdasarkan peruntukan tersebut.
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> 6.7. Saya menyatakan bahawa secara umumnya, terdapat 87 pertuduhan yang telah dikenakan terhadap saya sehingga ke hari ini. Jumlah pertuduhan yang besar ini telah secara tidak langsung mewujudkan impak dan persepsi negatif terhadap saya.
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> 6.8. Saya juga menyatakan bahawa impak dan persepsi negatif tersebut boleh menghalang saya daripada mendapatkan satu perbicaraan yang adil. Hal ini adalah kerana perhatian yang keterlaluan dan tidak berpatutan yang diberikan oleh masyarakat umum terhadap kes-kes yang melibatkan saya ini dipercayai mampu untuk memberikan kesan kepada kelancaran perbicaraan yang akan bermula kelak.

[20] We have scrutinised the course papers and we noticed that except for general averments of mala fide and oppression on account of prosecution not utilising of s 153(2) of the CPC to amalgamate the 12 charges, there is no specific proof of improper or bad motive on the part of the prosecution in preferring the 12 charges instead of three.

[21] It is trite law that the onus of proving mala fide is on the appellant who makes the allegation and it is not an easy one to discharge. The allegations of mala fide are often more easily made than proven and the very seriousness of such allegations demands proof of high order of credibility *Royappa v State of Tamil Nadu & Anor* AIR 1974 SC 555 at p 586. Mere suspicion is not enough. It needs to be established at least on a prima facie case *Yeap Seok Pen v Government of the State of Kelantan* [1986] 1 MLJ 449 at p 453.

[22] Going through cause papers, we are constrained to agree with the learned High Court who found on the fact, no evidence of mala fide on the part of the prosecution when the prosecution decides not to amalgamate the 12 charges into three charges.

CONCLUSION

[23] Based on the above said reasons, we find there is no merit in this appeal. Hence we dismissed the appellant's appeal. The decision of the learned High Court judge dated the 5 December 2019 is affirmed.

Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh